Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

SERRA CANYON COMPANY, LTD,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal for the Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), this Court condemned as "'an out-and-out plan of extortion'" a decision in which the California Coastal Commission approved a building permit on the condition that the property owner convey a public easement that was wholly unrelated to any adverse impacts caused by the owner's proposed building project. Before Nollan was decided, the California Coastal Commission conditioned some building permits not on immediate conveyance of unrelated property interests (as occurred in Nollan), but on the property owner's recordation of an offer to dedicate wholly unrelated property.

The question presented is:

Whether the California Coastal Commission and other state entities may thwart *Nollan*'s holding by accepting offers to dedicate wholly unrelated property that were coerced prior to *Nollan*, then invoking a 60-day statute of limitations as to the original Commission decision imposing the condition to bar any challenge to acceptance of the offer, even though the property owner did not lose the right to possess and exclude others from the property until the offer to dedicate was accepted, and any takings claim challenging the loss of these rights brought within 60 days of the Commissions's decision would have been unripe.

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the California Coastal Conservancy and Sam Schuchat, in his capacity as Executive Director of the California Coastal Conservancy, are respondents in this proceeding.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Serra Canyon, Ltd. has no parent corporation nor is there any publicly traded company that owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Serra Canyon Company, Ltd., respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal for the Second Appellate District in this case.

OPINIONS BELOW

The opinion of the Court of Appeal was entered June 15, 2004 and is published at 120 Cal. App. 4th 663 (2004) and 16 Cal. Rptr. 3d 110 (Ct. App. 2004) (Pet. App. 1a-11a). The California Supreme Court denied the petition for review of the Court of Appeal's decision on October 20, 2004 (Pet. App. 19a). The decision of the Los Angeles County Superior Court denying petitioner's prayer for a writ of mandate is not reported (Pet. App. 12a-18a).

JURISDICTION

The California Supreme Court denied petitioner's petition for review on October 20, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

At issue in this case is the continued vitality of the fundamental freedoms embodied in the Takings Clause of the

Fifth Amendment. In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), this Court condemned as "'an out-and-out plan of extortion'" a decision in which the California Coastal Commission approved a building permit on the condition that the property owner grant the public an easement that was wholly unrelated to any adverse impacts caused by the proposed construction project. *Id.* at 837. This case involves a far more egregious scheme of extortion. In 1981, petitioner's predecessor-in-interest sought a permit to expand a trailer park. In response, the Coastal Commission required petitioner's predecessor-in-interest to record an offer to dedicate in fee simple absolute a valuable and completely unrelated piece of coastal property some seven miles away from the trailer park. The offer to dedicate was made irrevocable for 21 years. The Commission gave *no* consideration in exchange for this offer to dedicate; petitioner's predecessor recorded the offer only because the Commission was holding the expansion of the unrelated trailer park hostage.

Seventeen years after *Nollan* condemned such extortionate tactics, the Commission's shake down was completed when the Court of Appeal ruled that the California Coastal Conservancy, a government entity to which the Commission had assigned its rights, was free to accept this coerced offer without paying a single penny to acquire the entire coastal property in fee. According to the lower court, because no takings challenge was asserted against the *Commission's* 1981 permit decision that coerced the offer to dedicate, petitioner was barred from challenging the *Conservancy's* legally distinct 2002 decision to accept that offer, which completely extinguished the petitioner's rights in its land. Yet, because the Commission's 1981 action did not strip the prior owners of any possessory interest in their property—indeed they were free to use and exclude others from it—there was no physical taking to challenge in 1981. Absent intervention by this Court, government entities up and down

the California coast will be free to accept hundreds of soon-to-expire offers to dedicate property that were coerced in blatant violation of the restrictions announced in *Nollan*, without regard to the fundamental constitutional right of property owners not to have their property taken without just compensation.

1. *The Regulatory Backdrop.* In the late 1970s, the Coastal Commission implemented a policy of refusing to issue building permits unless coastal property owners recorded offers to dedicate property to the public. These offers were temporary in nature; if not accepted by a local agency within 21 years, they would expire automatically. Conversely, exercise of the option conveyed to the accepting agency actual title to the property and the right to occupy it in perpetuity.

At the time these offers were coerced, their acceptance was uncertain for two reasons. First, an accepting entity had to ensure that it was able to assume the potentially significant liabilities and maintenance costs that attend ownership of public beach property. *Whaler's Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 14 (Ct. App. 1985). Second, because local governments would not accept property that the public could not reach (and thus could not use), acceptance of an offer to dedicate often depended on the Coastal Commission's ability to extort other offers to dedicate rights to neighboring properties. This contingency, in turn, depended on whether the owners of such neighboring property would seek approval for some improvement to their property, and then succumb to the Commission's coercive tactics. See generally *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 592, 601-02 (Ct. App. 1985).

2. *Factual Background.* Petitioner owns a valuable parcel of undeveloped beach-front property in Los Angeles County, California. It acquired the property in 1992 as part of a settlement agreement with Adamson Companies ("Adamson"), the predecessor-in-interest. In 1978, Adamson

sought to expand an unrelated mobile home park that it owned in Malibu, California. Although the mobile home park was not on the beach front, the development was within the jurisdiction of the Commission. In 1981, the Commission allowed the expansion, but imposed as a condition on the approval that Adamson make an irrevocable offer to dedicate in fee simple absolute its parcel of beach front property in Los Angeles County for a public park. In 1983, Adamson recorded an irrevocable offer in the Commission's favor that was valid for 21 years. Adamson did not challenge the Commission's action, and the Commission never accepted the offer.

In 1987, this Court held in *Nollan* that the Commission's strong-arm tactic of extorting rights to beach-front property by withholding unrelated building permits violated the constitution. In *Nollan*, the petitioners sought a permit to build a larger house on their beach-front property. The Commission refused to grant them permission unless they dedicated a public easement across their beach. The Court held that because the easement was unrelated to the regulatory purposes of the permit, the Commission's action constituted a takings. Five years after *Nollan*, Adamson transferred the beach-front parcel to petitioner.

By the late 1990s, the Commission had collected over 1,200 offers to dedicate rights to private coastal property, the vast majority of which had not been accepted. Realizing that hundreds of outstanding offers to dedicate would soon expire, the Coastal Commission began urging local governments to expedite the acceptance process for all offers pending in their respective jurisdictions. In 2002, the expiration date on the Commission's extorted offer to dedicate petitioner's beach-front parcel was fast approaching. The Commission transferred the offer to the Conservancy, which, in August 2002 informed petitioner that it planned to accept the offer in September, and thereby to extinguish completely petitioner's rights in the land.

3. *Proceedings Below.* In September 2002, petitioner sued the Coastal Commission and the Conservancy in Los Angeles County Superior Court. Petitioner sought a writ of mandate and an injunction to prevent the Conservancy from accepting the offer to dedicate and a declaration that acceptance would constitute a confiscation of its property without just compensation in violation of the Takings Clause and the Due Process Clause of the Fourteenth Amendment. The Superior Court issued a temporary restraining order but denied a preliminary injunction, and the Coastal Commission and Conservancy thereafter filed demurrers to the complaint. They argued that any challenge to the Conservancy's future acceptance of the offer to dedicate was an attack on the Commission's 1981 permit condition that should have been brought within 60 days of the Commission's decision to impose the condition. They also argued that petitioner had waived any right to bring a takings challenge because it was aware of the offer to dedicate when it acquired the property from Adamson in 1992. The Superior Court sustained the demurrer, and petitioner appealed to the California Court of Appeal.

On June 15, 2004, the Court of Appeal affirmed in an opinion that was published and is binding precedent. It held that it was the Coastal Commission's 1981 permit approval decision that "contains the condition that [petitioner] now finds noxious," and that, under California law, a challenge to a final permit approval decision must be brought within 60 days of such a decision. Pet. App. 4a. Because Adamson had failed to bring a timely challenge to that decision, the court concluded that petitioner, as a successor-in-interest, was "bound by Adamson's waiver of its right to seek timely writ review." *Id.* at 5a. The court refused to make any distinction between the Commission's original decision to coerce the offer to dedicate and the Conservancy's attempt to obtain complete ownership of the property more than 20 years later. The court deemed acceptance of the offer a mere "formality"

that did not revive an otherwise time-barred challenge to the Commission's 1981 permit decision.

In addition to treating petitioner's takings challenge to the Conservancy's 2002 decision to accept the offer as a "collateral attack on a decision that has been final for two decades," Pet. App. 7a-8a, the Court of Appeal concluded that petitioner's knowledge of the offer to dedicate when it acquired the subject property precluded a takings challenge. The court reasoned that, if a prior owner fails to demand just compensation for an offer to dedicate by pursuing all available state procedures, a subsequent owner cannot enjoin acceptance of the offer. "By accepting title to property with full knowledge that it is subject to an existing, recorded [offer to dedicate], a landowner cannot claim that the exercise of the [offer] amounts to a 'taking.'" *Id.* at 9a-10a.

Petitioner timely sought review in the California Supreme Court, which refused to hear the case on October 20, 2004.

REASONS FOR GRANTING THE PETITION

The Court of Appeal adopted a procedural bar that shields from review, and thereby effectively sanctions, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property. That procedural bar allowed the Conservancy, in plain contravention of this Court's holdings, to take completely petitioner's property without paying a penny in compensation or making any showing that the confiscation of the property was appropriately tied to any land-use request for which petitioner (or its predecessor-in-interest) sought regulatory approval. The Coastal Commission, moreover, has made clear its determination to preserve, by whatever means necessary, "the vitality of the many unaccepted offers of dedication" that it has previously coerced, and to encourage other local governmental bodies to accept as many of these soon-to-expire offers as possible. *Amicus Curiae* Brief of

California Coastal Commission in Support of Respondent County of Santa Barbara at 2, *Cole* v. *County of Santa Barbara*, No. B147339 (Cal. Ct. App. Dec. 17, 2001). The failure of the California courts to prevent such an open flouting of this Court's rulings is a compelling ground, in and of itself, to warrant review of the decision below.

But the blatant disregard for this Court's precedents is not all that justifies plenary review of the decision below. The procedural bar adopted by the Court of Appeal rests on two related errors of constitutional law, each of which warrants review by this Court. First, the lower court failed to recognize the legally distinct property deprivation that the Conservancy's 2002 conduct caused. Notwithstanding the Coastal Commission's 1981 decision to coerce an offer to dedicate the property, from 1983 (when the offer was recorded) to 2002, petitioner and its predecessor enjoyed the right to use and exclude others from the property. It was not until the Conservancy's 2002 acceptance of the offer to dedicate that petitioner lost all ownership of the property. The property will be physically occupied in its entirety by the conversion of petitioner's interest into a public park. Cf. *Loretto* v. *Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding the physical occupation of property is a per se taking). By failing to recognize the separate and far more significant deprivation that the Conservancy's conduct caused, the lower court allowed the Conservancy to violate petitioners' constitutional rights with impunity.

Moreover, the lower court's decision creates a procedural bar that is flatly irreconcilable with the special ripeness doctrine developed in the takings context. Because the Coastal Commission's 1981 tactic of requiring an *offer* to dedicate property (as opposed to an immediate transfer of property) did not strip petitioner's predecessor-in-interest of its right to exclude others or compel such a deprivation, no takings claim seeking compensation for the loss of this right could have been brought in any challenge prior to the

Conservancy's 2002 decision to accept the offer to dedicate. The Court of Appeal correctly pointed out that, generally speaking, those seeking to vindicate their constitutional rights must comply with state procedures in doing so. However, the question of when a constitutionally compensable taking occurs is a matter of federal law, and states cannot be allowed to avoid their obligation to provide just compensation through the ploy of requiring aggrieved citizens to bring a state court action literally *decades* before a taking is ripe. Plainly, any challenge to a taking by the Conservancy that did not occur until 2002, and that might never have occurred, was in no sense "ripe" for purposes of the takings clause in 1981, when the offer was coerced.

The erroneous decision below allowed the Conservancy to escape its "categorical duty" to pay compensation for a "permanent physical occupation authorized by the government," *Loretto*, 458 U.S. at 426, and improperly allowed the Commission "to put an expiration date on the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001). Absent review by this Court, these constitutional violations will continue to be rampant. The decision below clears the way for the acceptance of hundreds of other coerced offers to dedicate rights to property that are due to expire in the next few years—offers that the Coastal Commission is making every effort to ensure are accepted.

I. THE CONSERVANCY'S ACCEPTANCE OF THE OFFER TO DEDICATE WAS ITSELF AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The decision below raises a fundamental question of constitutional law: when one governmental agency forces a property owner to record an *offer* to dedicate his or her property in fee simple absolute to the public, and a separate governmental entity later *accepts* that offer and thus, for the first time, divests the owner of the right to possess and exclude others from the property, does the latter action work a legally distinct deprivation of property without just

compensation? The Court of Appeal concluded that it does not, and that any constitutional injury the property owner suffers stems solely from the initial decision to compel the offer. That conclusion, which is the central predicate underlying the procedural bar created by the Court of Appeal, is demonstrably wrong.

Although state law defines the property interests that the Takings Clause protects, see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980), whether and when a compensable taking has occurred are questions of federal law. In this case, the Coastal Commission did not condition its permit approval on an immediate conveyance of rights in the subject property, as it had in *Nollan*, see 483 U.S. at 828-29. Rather, it required Adamson to record an *offer* to dedicate an entire coastal property to the Commission. By its terms, this offer lasted for a period of 21 years; if it was not accepted during that period, the offer would expire.

It is a well-settled principle of California law that, when an offer to dedicate a property interest is made, the public does *not* thereby acquire an immediate right to the interest. See *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). Rather, an unconditional acceptance is required to complete a dedication. *Baldwin* v. *City of Los Angeles*, 83 Cal. Rptr. 2d 178, 187 (Ct. App. 1999). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivancovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only* if accepted by a public agency"). Indeed, this is a principle the Commission itself explicitly recognizes: "[Offers to dedicate] are only *offers* . . . . *The interest belongs to the property owner until the offer is accepted* by a government agency . . . ." Cal. Coastal Comm'n, *Public Access Action Plan* 14 (June 1999) (second emphasis added).

Contrary to the conclusion of the Court of Appeal, therefore, the Conservancy's acceptance of the 1983 offer to dedicate did not merely "formali[ze]" a loss of property interests that petitioner's predecessor-in-interest had conveyed away two decades earlier. Rather, the offer to dedicate the property did not itself divest either Adamson or petitioner of the essential rights that attend ownership of property—*i.e.*, the right to use and to exclude others. Indeed, in *Grupe*, the court explained that an offer to dedicate still allows a property owner to "exclude the public from the privately owned portion of his beach until such time as a public agency . . . agrees to accept the offer and the concomitant responsibility to police the beach." 212 Cal. Rptr. at 592. See also *Whaler's Village Club*, 220 Cal. Rptr. at 15 (Commission abused its discretion in denying a landowner the right to exclude the public from property prior to acceptance of an offer to dedicate, because such a denial improperly "turns the offer to dedicate public access into an immediate easement").

Accordingly, even after the Coastal Commission issued its 1981 permit condition requiring Adamson to record an offer to dedicate the beach-front property, and even after Adamson recorded that offer in 1983, Adamson retained—and later conveyed to petitioner—full use and possession of the property in question, including "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Nor did the Commission's 1981 exaction render the loss of these rights inevitable. To the contrary, the likelihood that the government would take possession of the property was quite minimal. See *Grupe*, 212 Cal. Rptr. at 592, 601-02; see also *supra* at 3. And of course, if no public agency formally accepted the offer to dedicate within 21 years of recordation, the offer would expire by its terms and petitioner would have

retained title completely unburdened by the offer. See 212 Cal. Rptr. at 602.

It is thus clear that it was the Conservancy's acceptance of the offer to dedicate in August 2002, and not the Coastal Commission's 1981 exaction of that offer, that deprived petitioner of ownership of its property. As a result of the Conservancy's acceptance, petitioner is forced to bear the permanent and complete loss of its property. See *Copeland* v. *City of Oakland*, 23 Cal. Rptr. 2d 719, 722 (Cal. Ct. App. 1993) (upon acceptance of an offer to dedicate, "'the property is thereafter held in trust for public use'" and is "'no longer subject to private control'"); Cf. *Loretto*, 458 U.S. at 426. The Conservancy's acceptance of the offer to dedicate worked a legally distinct deprivation of property that is subject to the protection of the Takings Clause.

The Court of Appeal failed to recognize the legally distinct taking occasioned by acceptance of the offer because, in its view, petitioner's constitutional claim "derives solely from the Commission's 1981 permit condition, not from the formalities involved in enforcing that condition." Pet. App. 8a. This argument is manifestly mistaken. Although the Coastal Commission's decision to impose the unconstitutional condition was a necessary predicate for the Conservancy's later decision to accept the offer to dedicate, the two decisions are logically and legally distinct. In accepting the offer to dedicate, the Conservancy made its own discretionary choice that was in no way compelled by the original permit condition. See *Grupe*, 212 Cal. Rptr. at 592 (noting that it was unlikely that a public agency would actually accept the offer to dedicate at issue in that case). In making this decision, moreover, the Conservancy had an independent duty to respect the constitutional rights of property owners. Its decision to accept an offer to dedicate fee title to property that was extorted by a process patently impermissible under this Court's decisions in *Nollan* and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), is a legally separate governmental act that

caused an injury that the original extraction made possible but did not, by itself, cause. See *Whaler's Village Club*, 220 Cal. Rptr. at 14-15.[1]

In short, although the same constitutional flaw infects both the Coastal Commission's action and that of the Conservancy, the latter's acceptance of the offer to dedicate resulted in a constitutional injury that the Commission's permit decision alone did not cause. Furthermore, the complete loss of ownership inflicted on the petitioner by the Conservancy's action, and the resulting permanent physical occupation of the land by the government, results in a legally distinct form of taking under *Loretto*. This Court should grant review in order to make clear that the dictates of the Takings Clause cannot be circumvented by state efforts to appropriate private property in two steps rather than one.

II. THE PROCEDURAL BAR CREATED BY THE COURT OF APPEAL'S DECISION IS IRRECONCILABLE WITH THIS COURT'S RIPENESS DOCTRINE.

The decision below is also fundamentally inconsistent with ripeness principles that operate uniquely in the Fifth Amendment takings context.[2] The lower court adopted a

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[1] Under the contrary, and misguided, reasoning of the lower court, a local government would today be free to accept an offer to dedicate property for a "whites only" beach that a permitting body coerced when de jure racial segregation practices were under legal attack but had not yet been deemed unconstitutional or proscribed by any federal statute. Although the same equal protection violation would inhere in both the permit and the subsequent acceptance decision, it is perfectly clear that a decision to accept such an unlawful offer gives rise to a separate constitutional wrong by a separate state entity bound to respect constitutional rights.

[2] "Ripeness" in the takings context comes not from Article III, but from the Takings Clause itself and goes to the question of whether or not a compensable taking has actually occurred. For example, in *Palazzolo* the Court engaged in an extensive "ripeness" analysis of the lower court's

procedural rule that bars judicial review of a valid takings claim, and thereby impermissibly "relieve[s] [the State] of the duty to provide compensation." *First English Evangelical Lutheran Church* v. *County of Los Angeles, Cal.*, 482 U.S. 304, 321 (1987). As it did in *First English*, this Court should grant review to correct this constitutional error and to make clear that the "failure" to bring a plainly unripe claim cannot serve as the basis for precluding judicial review of a scheme that attempts to sidestep the dictates of the Takings Clause.

That the Takings Clause keeps a property owner from pursuing a takings challenge until there has been a final government decision is well-established. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985); see also *Palazzolo*, 533 U.S. at 620-21 (as a general rule, a takings claim is not ripe until "a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation" such that the "extent of the restriction on property is . . . known"). Under California law, it is clear that no state agency made a final decision to divest petitioner of ownership of its beach-front parcel until the Conservancy's 2002 decision to accept the offer to dedicate. Any claim seeking redress for a physical taking would have been entirely premature in 1981; at that time, and for more than two decades thereafter, no one knew whether, or when, a public agency might decide to accept the offer to dedicate. See *Grupe*, 212 Cal. Rptr. at 602 ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]").

The Court of Appeal's conclusion that petitioner's claims were barred by the "failure" of its predecessor-in-interest to file a takings claim challenging the Commission's decision to

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decision, despite the fact that the litigation had occurred entirely in state court. *See Palazzolo* v. *Rhode Island*, 533 U.S. 606, 618-26 (2001).

coerce the offer to dedicate is flatly inconsistent with these principles. Under this Court's precedents, it is clear that any challenge to the taking caused by the Conservancy's acceptance of the offer to dedicate was unripe when the offer to dedicate was recorded, and that petitioner's predecessor could not have brought (and thus could not have waived) a challenge to the loss of property rights (*i.e.*, the rights to possess and to use exclusively) that were not divested until 2002. Indeed, the Court of Appeal's flawed reasoning would allow a recording landowner to obtain an undeserved windfall—she would be entitled to compensation for the full value of a property loss that might never come to pass if the offer to dedicate expired without acceptance, or, as actually happened here, that might be suffered by another. See *Danforth* v. *United States*, 308 U.S. 271, 284 (1939) ("compensation is due at the time of taking, [and] the owner at that time, not the owner at an earlier or later date, receives the payment").

The Court of Appeal insisted that the petitioner's claim was nothing more than an attempt to attack a long-final administrative decision. Inverse condemnation actions, the court insisted, must comply with state procedural rules, and those rules require challenges to final Coastal Commission permit decisions within 60 days. The court placed particular emphasis on the fact that, in *Nollan*, the aggrieved parties took an immediate appeal from the adverse administrative action within the period specified by the statute of limitations.

This reasoning, however, ignores the crucial difference between a permit condition that requires an *immediate* conveyance of property interests, and one that requires the recording of an offer to dedicate. Because *Nollan* involved the former type of condition, see 483 U.S. at 828-29, Nollan could and did bring a ripe takings claim in the statutorily prescribed manner and time period for challenging adverse administrative action. This case, by stark contrast, involves a condition that did not itself divest the property owner of

property rights, but merely compelled an offer to dedicate such rights. The loss of property rights, therefore, remained contingent on acceptance, which is itself an event contingent on a number of factors, some beyond the control of any governmental entity. See *Baldwin*, 83 Cal. Rptr. 2d at 187; *Grupe*, 212 Cal. Rptr. at 592, 602; *Whaler's Village Club*, 220 Cal. Rptr. at 14. For these reasons, petitioner is bringing a takings claim that the previous owner could not have brought, and thus could not have waived.

In any event, it is clear that judicial review of valid takings claims cannot be foreclosed based on the considerations endorsed by the court below. In *Palazzolo*, this Court flatly rejected a rule that a successive title holder with notice of an existing limitation has no right to be free from an uncompensated taking. Condemning such a bar as "too blunt an instrument to accord with the duty to compensate for what is taken," this Court held it would be illogical and unfair to allow the state to secure a windfall where, as here, ripeness principles prevented petitioners' predecessors from maintaining the takings claim petitioners now bring. 533 U.S. at 628. The property owner's equities in this case are particularly strong because this court had declared the Coastal Commission's conditioning practices unconstitutional years before the property was acquired. No one reasonably could have predicted the massive disregard for this Court's precedent that the Coastal Commission and other local agencies would undertake in the wake of *Nollan*.

This Court should continue to reject procedural bars that seek to compel the bringing of takings claims that, under this Court's precedents, are plainly unripe, particularly where, as here, a "failure" to bring such an unripe claim then forms the basis for precluding *any* judicial review of an unquestionably meritorious takings claim. The decision below improperly allows the State of California to confiscate its citizens' property and then avoid paying any compensation by claiming that the confiscation should have been challenged

two decades earlier when it was nothing more than a speculative possibility. Indeed, this Court just recently granted review to decide the propriety of a decision holding that, once a property owner lost the state law-based takings claim it was required to file in order to pursue a ripe federal takings claim, it was barred by principles of issue preclusion from prosecuting a federal takings claim. See *San Remo Hotel, L.P.* v. *San Francisco City*, 364 F.3d 1088 (9th Cir. 2004), *cert. granted in part by* 125 S. Ct. 685 (Dec. 10, 2004). Review is even more warranted here, where California's procedural requirements effectively bar any consideration—under state or federal law—of a meritorious takings challenge that could not have been brought within the 60-day limitations period governing review of permitting decisions.

III. UNLESS THIS COURT GRANTS REVIEW, HUNDREDS OF OTHER UNCONSTITUTIONAL DEPRIVATIONS WILL ESCAPE JUDICIAL REVIEW.

Absent this Court's intervention, the unconstitutional taking of property that occurred in this case will not be isolated: government entities throughout California will understand they are free to accept a huge number of outstanding offers to dedicate without satisfying the commands of the Fifth Amendment. There are literally hundreds of offers to dedicate various property rights coerced by California's Coastal Commission that are due to expire soon. Furthermore, the Commission's intention to secure acceptance of as many of these offers to dedicate as possible, regardless of this Court's clear disapproval of its tactics in *Nollan*, is well-documented. See James Rainey, *California and the West: Faster Action by Agencies Is Preserving Beach Access*, L.A. Times, July 10, 2000, at A3, *available at* 2000 WL 2258956.

Second, the decision below provides a clear roadmap that other government entities can use to escape this Court's holdings in *Nollan* and *Dolan*. Rather than employ direct

extortion as in *Nollan*, government entities can simply use the "offer to dedicate" scheme to avoid paying for their takings. Most landowners have little or no incentive to mount a takings challenge to a coerced offer to dedicate given that (1) any such challenge would be dismissed on grounds that it is unripe, see *supra* at 14-16, and (2) the remote possibility that such an offer will ever affect the current landowner. Thus, the government can extract such offers with impunity, wait years to implement the actual taking, and resist subsequent compensation claims based on the "waiver" and statute of limitations principles endorsed by the decision below. The resulting procedural bar prevents the truly injured landowner from challenging the real taking because no one, consistent with this Court's ripeness doctrine, could have acted in response to the relatively trivial action taken earlier. This Court should grant the petition in order to ensure that the procedural bar adopted below does not render the mandate of *Nollan* and *Dolan*—which were thought to be landmark decisions—completely meaningless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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